

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2003G075

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JEFF HIJAR,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS, COLORADO STATE PENITENTIARY,

Respondent.

Administrative Law Judge (ALJ) Stacy L. Worthington heard this matter on March 14, 2003. Assistant Attorney General Luis Corchado represented respondent Department of Corrections (DOC), Colorado State Penitentiary (CSP). Complainant represented himself.

MATTER APPEALED

Complainant appeals his disciplinary termination. For the reasons set forth below, respondent's action is **affirmed**.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether the discipline imposed was within the range of available alternatives.

FINDINGS OF FACT

The ALJ has considered the exhibits and the testimony, assessed the credibility of the witnesses and makes the following findings of fact, which were established by a preponderance of the evidence.

1. Complainant was employed as a correctional officer at the Colorado State Penitentiary (CSP) on October 1, 2002.

2. CSP is a level 5 maximum security facility. It has the highest security level of any state correctional facility. CSP has 756 inmates, all of whom are considered to be the most dangerous, violent, and disruptive inmates in the state's prison population. Because their behavior is very unpredictable and they are so dangerous and disruptive, CSP inmates are not allowed to work.

3. DOC also operates the Four Mile Correctional Facility, which is a level 2 or minimum restricted facility. Though Four Mile has a lower security classification than CSP, that does not mean that the Four Mile inmates are predictable or not dangerous, but they are considered to be a lower risk than inmates at a higher-security facility. Some of the Four Mile inmates have been convicted of violent crimes, including murder. Four Mile provides inmate support workers to CSP. Those support workers include inmates who have been convicted of crimes ranging from drug offenses to murder.

4. On October 1, 2002, complainant was working in the food service area at CSP supervising the Four Mile workers who were doing meal production. There were four staff members on duty that day, including Sergeant Linda Schwab, who had recently returned to work after undergoing hip surgery. There were 22 or 23 inmate workers that day.

5. Schwab and Sergeant Tracy Lane were standing near the tool cabinet discussing the tools that still needed to be checked in. Complainant was about 10 to 12 feet away from where they were standing.

6. Lane saw complainant put his hand on inmate MC's chest and force MC down over a utility cart. Schwab did not see complainant push MC down, but she did see MC lying on the cart with complainant leaning on him, pinning him down. MC was kicking his legs as if he was trying to get up.

7. Neither Schwab nor Lane saw MC touch complainant or do anything to provoke complainant.

8. MC stood up from the cart and said something to the effect of, "Oh, I see how it is, that's straight up inmate assault."

9. Complainant walked over to Lane and Schwab and said, "You didn't see anything, did you?" Lane and Schwab took this question to mean that complainant knew he had done something wrong and did not want them to tell what they had seen.

10. Schwab and Lane were stunned by this event. Correctional officers are not allowed to touch inmates. If the other inmates had seen this incident, they could have rioted and could easily have overpowered the staff, who were not armed.

11. That night, Lane called Lt. Glinda Vendetti at home and told her about the incident. Vendetti wrote a letter to her supervisor, Major Rick Wright, about the incident.

12. The day after the incident, Vendetti took MC to medical to be examined. When she went to get MC, he said he knew why she was there. MC also said, "If the roles were reversed, my ass would be in a sling." Vendetti understood that MC meant if he had grabbed complainant and put him down, he would be charged with assault.

13. Vendetti put together a packet containing accounts of the incident and other documents to give to Warden Larry Reid, complainant's appointing authority.

14. Reid met with Vendetti and Wright on October 2, 2002, to discuss the incident. He also met with complainant and put him on administrative suspension with pay.

15. At the warden's request, Doc Investigator John Lutenberg investigated the incident. He interviewed the inmates and the staff who were on duty at the time of the incident. Complainant told Lutenberg that he was walking past MC when MC pushed him. He thought MC was horseplaying, so he grabbed MC by the shirt and shoved him back. He did not see the card and did not intend to make MC fall. He said he was joking when he asked Lane and Schwab if they saw anything. Warden Reid also talked directly to Lane, Schwab, Vendetti, Wright, and complainant's previous supervisor, Capt. Susan Buchanan, to gather information about the incident and about complainant's performance history. Warden Reid also reviewed complainant's training and performance records.

16. Warden Reid conducted an R-6-10 meeting, which complainant attended without a representative. Complainant admitted that he had pushed MC down over the cart, but was adamant that his conduct was not assault, it was mere horseplay.

17. Warden Reid agreed that complainant's conduct was horseplay, not assault, but believed that it was still serious and flagrant. Using excessive force, even in a controlled or joking way, can cause a tremendous risk in a prison environment. Food service is one of the major areas where prison riots occur, so there is a heightened risk there. A Colorado correctional officer in another facility was killed by an inmate in the food service area.

18. Warden Reid looked at complainant's performance documentation, which included a corrective/disciplinary action in May 2002. That action was administered for a second incident of sleeping in the kitchen office. Complainant had also been written up in November 2001 for driving erratically in a van while transporting inmates, and had received numerous critical comments on daily staff contact records for conduct such as tool control problems, abandoning his post, presenting a deceptive time sheet, and misuse of leave. Complainant had also received a needs improvement evaluation.

19. Warden Reid concluded that complainant's conduct violated several provisions of DOC Administrative Regulation 1450-1, Staff Code of Conduct. That regulation prohibits conduct unbecoming a correctional officer and excessive physical force against offenders. Section IV E of AR 1450-1 specifically prohibits horseplay between staff and offenders, including acts such as wrestling and pushing.

20. Warden Reid concluded that complainant presented a serious and flagrant risk in the work environment and had demonstrated a history of erratic behavior. He therefore decided that termination was appropriate.

DISCUSSION

I. Standard of Proof.

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. art. 12, § 13(8); § 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R-6-9, 4 CCR 801, and generally includes failure to comply with standards of efficient service or competence; willful misconduct or violation of the State Personnel Board rules or the rules of the agency of employment; willful failure to perform or inability to perform duties assigned; and final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen, supra*. The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

An appointing authority has the discretion to administer corrective and disciplinary actions. Rule R-1-6, 4 CCR 801. In the present matter, the appointing authority reasonably considered the evidence that he had before him and properly determined that disciplinary demotion was justified. He did not abuse his discretion. *See* Rules R-6-2, R-6-6, R-6-9, R-6-10, R-6-11, and R-6-12, 4 CCR 801 (regarding disciplinary actions).

II. Complainant committed the acts for which he was disciplined.

Complainant admitted that he grabbed MC and pushed him backwards over a cart. He also admitted that his behavior was horseplay, which is specifically prohibited by AR 1450-1, Section IV E.

III. The disciplinary action was not arbitrary, capricious or contrary to rule or law.

In Colorado, arbitrary and capricious agency action is defined as:

(a) neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising its discretion in such manner after a consideration of evidence before it as clearly to

indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.

Lawley v. Dep't of Higher Education, 36 P.3d 1239, 1252 (Colo. 2001), citing *Van DeVegt v. Board of County Commissioners of Larimer County*, 55 P.2d 703, 705 (Colo. 1936).

The appointing authority based his findings and conclusions on substantial evidence. The discipline imposed falls within the range of alternatives available to the appointing authority. Respondent proved by a preponderance of the evidence that there was just cause for the discipline that was imposed. *See Dep't of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994) (explaining role of state personnel system in employee discipline actions).

Here, the record establishes that complainant engaged in conduct that violated DOC AR 1450-1. Complainant's actions could have place himself and the other three staff members, as well as inmates, in physical danger. Many witnesses testified that the inmate workers in the kitchen were unpredictable, and that if they had perceived complainant's conduct as being an attack on another inmate, they could have rioted and overpowered the unarmed officers. Complainant's actions were specifically prohibited and were dangerous.

Moreover, complainant's performance record included a recent corrective/disciplinary action and substantial documentation of repeated performance deficiencies. Under the circumstances, the appointing authority's decision to terminate complainant was well justified.

CONCLUSIONS OF LAW

1. Complainant engaged in the conduct for which discipline was administered.
2. Respondent's disciplinary termination was not arbitrary, capricious or contrary to rule or law.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ____ day
of April, 2003, at
Denver, Colorado.

Stacy L. Worthington
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS:

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). If a party chooses to appeal the decision, that party must file a designation of record with the Board within 20 calendar days of the date the decision of the ALJ is mailed to the parties, and must file a written notice of appeal with the State Personnel Board within 30 calendar days after the decision of the ALJ is mailed to the parties. The Board must receive the notice of appeal within the 30-day deadline. If the Board does not receive a written notice of appeal within the 30-day deadline, the decision of the ALJ becomes final and unappealable.

PETITION FOR RECONSIDERATION

A party may file a petition for reconsideration of the ALJ's decision within 5 calendar days after receipt of the ALJ's decision. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. Filing a petition for reconsideration does not extend the 20-day deadline for filing a designation of record or the 30-day deadline for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the ALJ's decision must pay a \$50.00 fee to prepare the record on appeal. This fee does not include transcription costs. The party may pay the fee by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. If the Board does not receive the transcript within that time, the transcript will not be included in the record on appeal and the party will be prohibited from challenging the findings of fact. For additional information, contact the State Personnel Board office at (303) 894-2136.

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of April, 2003, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Jeff Hjar
308 Palmer Lake Dr.
Pueblo West, CO 81003

And through interagency mail to:

Luis Corchado
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, CO 80203
